Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of )
)
Exclusive Service Contracts For Provision )
Of Video Services In Multiple Dwelling )
Units And Other Real Estate Developments ) Docket No. 07-
51
) FCC 07-32-189Al
)
To: The Commission

COMMENTS OF THE
INDEPENDENT MULTIFAMILY COMMUNICATIONS COUNCIL (IMCC)
IN THE FURTHER NOTICE OF PROPOSED RULEMAKING

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## I. Introduction and Summary

### A. What is IMCC?

The Independent MultiFamily Communications Council ("IMCC") represents Private Cable Operators ("PCOs") also referred to as SMATV operators, MDU/REIT development and management companies, manufacturers/vendors, programming distributors and others that provide video competition to MDU community residents. More information describing PCOs is included below.

PCOs are deeply interested in this Further Notice of Proposed Rulemaking because what the Commission decides in this regard will determine if many small, independent companies in this industry survive or not. This is so due to how PCOs are structured, the means by which they finance the provision of services and the overall structure of the Multichannel Video Programming Distributors ("MVPD") market. If they do not survive, competition provided by PCOs with franchised cable companies and the newer common carrier providers will be diminished thereby eliminating one option presently available to MDU owners and residents.

It is understandable that the Commission seeks information about PCOs. PCOs are unique among MVPDs. That uniqueness is one of the industry's competitive benefits for MDU residents.

### B. FCC Video Competition Objectives

The Commission has been charged by Congress with accomplishing numerous objectives. One is to maximize and enhance competition in the video market. That is facilitated by increasing the number and quality of providers. Competition leads to the provision of expanded products and services to subscribers and reduced rates. PCOs do just that. That then provides numerous benefits for MDU residents.

### C. Importance of Parity

An element of accomplishing the above objective is parity in regulatory influence among providers. In general parity is important but is only one of numerous objectives of the Commission and often is inconsistent with other objectives. It should be pursued but should not be the sole determinate in all situations. In fact, to accomplish the objective of enhanced competition, strict adherence to the principle of parity may be counterproductive. That is the case in this instance. In other words, in many instances the Commission makes regulatory decisions based on the application of theory and at other times adopts regulations based on the reality of the marketplace. In this regard, it is important that the adoption of regulations regarding exclusive contracts with PCOs, bulk contracts and marketing agreements should seek out what works in the real world marketplace, particularly if that leads to benefits for the very consumers the Commission is seeking to benefit. It seems that to accomplish the objective of enhanced competition, the Commission should pursue regulatory balance. However, given the influence of factors such as past regulatory decisions which strongly favor MSOs and common carriers, exact parity can never be achieved but equity of result may be attainable. Although exact parity is a goal, but not attainable, virtual parity is a productive substitute, and that is attainable. The prohibition on exclusivity by PCOs will not produce parity. Continued use of exclusivity by PCOs is an element helping to allow equity of opportunity.

## II. What are PCOs and How Do They Operate?

### A. Origins of PCOs

The reason PCOs exist is that numerous years ago MDU owners and their residents were dissatisfied with the products and services provided by franchised multiple system cable operators ("MSOs"). MDU owners then established their own, in house, distribution systems called Master Antenna Television ("MATV") systems. This was a logical response given their dissatisfaction. However, many MDUs found MATV systems difficult to administer and to operate. That then led to the birth of the PCO industry. PCOs stepped in to the void and provided higher quality products and services at reduced prices. The PCO industry has gone through expansions and contractions. Regardless, these companies have persisted and have developed a toehold in the MDU market precisely because they offer benefits sought out by MDU owners and residents. That persistence and continuing demand is not because PCOs are large, well funded or nationwide providers. In fact, it is because they do not have those characteristics that demand for PCOs' products, services and other operational factors continues and could grow if the environment is conducive to expansion. An important element in that environment is the regulatory structure established by the Commission and the States.

### B. Who Do PCOs Serve and With What Products?

PCOs only serve MDUs that do not require using public rights-of-ways. MDUs include not only traditional townhouse, garden and highrise apartment and condominium communities, but also single family homes in planned unit developments ("PUDs"), hospitals, prisons, public housing, nursing homes and assisted living facilities, university and school campus housing, hotels and other types of residential settings (collectively "MDUs"). MDUs, by their governing documents and state law authority, may and often, must enter into contracts for many services for the benefits of their residents including management, landscaping, garbage removal, electric, gas, water, sewer, security, communications and video. Generally, PCOs provide video service to MDUs using satellite dishes which collect programming signals and use headends and coaxial cable wiring or fiber to distribute that programming to individual residential units. They buy programming from aggregators or DBS companies that acquire programming from content distributors.

PCOs formerly only provided channels in analog format using coaxial cable as the in-building distribution system. Today, PCOs still provide programming in the analog format but now also provide digital distribution, Internet/broadband connectivity, wireless broadband, and many offer telephony using various technologies. Therefore, PCOs provide the triple play which is in such demand. Also, fiber distribution systems are now commonplace. PCO products also include other benefits to MDU residents such as in-community security, closed circuit monitoring, WiFi services in common areas, community channels, medical alert systems, and private communications systems. Because of their unique ability to tailor their services for the unique needs of MDUs, PCOs have not only kept up with resident demand, but match or exceed in most respects what MSOs and common carriers can provide, frequently at lower cost to consumers.

### C. Number and Size of PCOs

Although there are hundreds of PCOs, no one knows the exact number. That is because they are not required to submit information to local, state or the federal governments. We also do not have comprehensive data regarding the size of these companies in terms of passings/subscribers, employees, annual revenue or other criteria.

Based on surveys of the industry and estimates made by long-time industry leaders, it appears that the significant majority of PCOs provide service only in localities close to their headquarters, have fewer than 5,000 subscribers, have fewer than 10 employees and generate revenues of less than three million dollars per year. The FCC 12th Annual Report to Congress Regarding Video Competition indicates that in 1995 there were fewer than 900,000 subscribers for the PCO industry, and the number was declining. IMCC has endeavored to make estimates regarding the number of subscribers but has not been able to confirm a number. In fact, we believe the total subscriber number to be somewhat lower, particularly if one counts only those subscribers in the traditionally defined MDUs, excluding senior citizen housing, prisons, student housing, hotels and so forth.

Regarding markets served, most PCOs only provide service in small geographic areas, not on a nationwide or even regional basis. However, PCOs do compete effectively in MDU communities, in communities owned by REITs, in condominiums, in greenfield or new PUDs and in prefabricated home communities.

### D. PCO Services

PCOs respond to what the market demands. That means that whatever products and services are demanded by residents in a specific MDU are what PCOs endeavor to provide. They are skilled at doing so because they are close in proximity to the MDU communities and are therefore able to provide more hands-on contact with MDU managers and residents. These face-to-face relationships lead to faster and more specific response to problems and requests made by consumers. Also, PCOs are not mega-corporations with layers of management that must be concerned with standardizing products over a wide geographic area. They are small and local, making them more nimble and tuned into to what MDU communities demand. They also recognize the need to out-compete the much larger competitors. That requires PCOs to provide what the market requires, such as the triple play, and do so in a way that is tailor-made to consumer demands.

PCOs also differentiate themselves from MSOs by providing customized products. That means that PCOs can provide channel line-ups reflecting the demographics of the community. For example, if an MDU community has a high concentration of young families, senior citizens or residents that speak a particular foreign language or of a particular nationality, then PCOs can offer more channels that those residents require as a customized channel-by-channel lineup. That is significantly different than what MSOs or common carriers will do. Those providers offer channels in large packages or tiers for all customers in an entire service area, usually an entire city or region, regardless of the demographics of specific MDU communities. This is a considerable consumer benefit provided by PCOs that the Commission should not terminate by prohibiting the use of exclusivity by PCOs.

### E. PCOs Have Evolved To Remain Competitive

Despite MSO tactics to limit PCO competition in MDUs (see below section III. B. 2), PCOs have not only persisted but have expanded their products and services and are competitive. One important reason for that is that the right of entry agreements ("ROEs") between MDUs and PCOs most often include so-called "most favored nations" provisions that require the PCO to provide "comparable service levels and products" to franchised MSOs in the area of the MDU. This then means that whatever other providers are offering in that area must also be offered by PCOs. This assures consumers in MDUs served by a PCO that they will receive comparable or better services that will be made available in that area by the MSO and that the services and products offered by the PCO will not become outdated.

That is why PCOs now offer not only analog but also digitally transmitted programming of several tiers, premium services, High Definition programming, Broadband Internet connectivity, WiFi and, in many communities, different types of telephony service—the so called triple play. To an increasing extent that includes IP enabled video and voice. The demand is there, other providers are offering those products and the ROE requires PCOs to match or exceed whatever is available from the MSO in that area. PCOs view that as a positive force in the MDU market that benefits residents. That requires PCOs to invest considerable amounts of money in new infrastructure and technology. If exclusive contracts are not available for PCOs, such investment capital will not be available and PCOs will not be able to compete, thereby diminishing what MDUs can make available for their residents. That is the opposite from enhanced video competition. Another factor is that MSOs serve entire cities or regions and a single, individual subscriber has virtually no negotiating leverage with the MSO regarding channel line-ups, rates, or other characteristics of service. In the PCO case, the MDU owner and residents, through their exclusive agreement with the PCO, have contractual rights to influence the PCO's products and services.

### F. PCO Financial Model

Banks and other financial institutions loan money for either or both of two reasons; either as an asset loan or a cash flow loan. No lender wants the physical assets, headends and associated hardware, of the PCO should it default on its loan agreement. They have little value in the after-market. For small operators physical assets do not serve as collateral. Therefore, virtually all financing of PCOs is made available on a cash flow loan basis.

A cash flow loan requires there to be a recurring and predictable revenue stream. Without those elements lenders will not feel secure about repayment by the PCO and the loan will not be made. With those elements present lenders find sufficient security to warrant a loan to the PCO.

Lenders find that both elements are present if the ROE includes an exclusive access/service provision. In virtually all situations the lender will not make the loan based on the asset value of the PCO, but will do so on a cash flow basis if there is an exclusivity provision.  In a non-exclusive contract situation there is insufficient predictability of a recurring revenue stream for the lender to take the risk of making the loan.  Most PCOs have no other way to securitize the loan which lenders require in order to fulfill their business model. Consequently, if the ROE does not include such a provision the risk for the lender is much higher and the loan will not be made. Securitization is required in order for the loan to be made.

The competitors of PCOs usually have access to large financial resources.  This allows them to build out the infrastructure for entire geographic areas, cities, counties and regions. However, PCOs finance projects on an MDU by MDU community basis. If the PCO is to begin service in a particular community[1] it must abide by the lenders requirements. If the PCO cannot obtain financing to build out the first MDU it cannot provide the competition that is sought by the FCC and which benefits MDU residents. If that occurs the ultimate result is that the PCO will be forced out of business which obviously means there will be less competition.

If the PCO does obtain financing to begin service in one MDU, and if it satisfies the loan covenants, then that lender, or a comparable one, is more likely to finance the PCO for expansion to other MDU communities. Exclusive access for the PCO is essential to this entrepreneurial method of growth.  If that type of ROE is not

[1] Often a PCO is required to enter into a collateral assignment of its ROE contract with its lender whereby the lender is entitled to step into the shoes of the PCO if it defaults on the ROE agreement or its loan.

executed the PCO will not be able to obtain financing and consequently not provide service.

The above describes what has been the PCO financial model since they came into existence. If that financial model is fundamentally changed, it is clear that most PCOs will be unable to obtain financing and will go out of business. We wish that were not the case, but that is the financial reality in this marketplace.

It is important to remember that PCOs commonly serve MDUs in ex-urban areas that have less dense populations and where the size of MDUs is generally smaller. If a PCO seeks to serve properties in areas with lower populations and where the average size of properties is smaller the cost to serve each resident is higher than in large metropolitan areas such as Atlanta, Houston or Phoenix. The large providers are more inclined to serve the larger, more population concentrated areas of the country. That does not mean that the residents in smaller cities and towns and in smaller MDU communities should not receive the benefits of competition that are provided by PCOs.

Also, the capital expenditure per subscriber for PCOs is considerably higher than for the larger companies. This is so for infrastructure reasons and because of the way the capital markets function. First, if a large operator wants to serve an MDU all it needs to do is run its coaxial cable or fiber from the street to the building. They do not need to install a different headend at each property. They distribute their signal from a central location. In the case of a PCO, it needs to pay for, install and maintain a headend and associated hardware at each property. This significantly increases its capital expenditure per subscriber, increases the interest rates at which loans are made and extends the duration needed to recoup that investment. Therefore, its cost per subscriber is automatically increased relative to the cost incurred by the larger providers. It is also clear that the cost of providing service in a building with a 1,000 subscribers will be much lower than providing service in a building with 250 subscribers. The average subscriber size of buildings served by PCOs is significantly less than 250. It should also be remembered that the cost to provide service in highrise buildings is much less than for garden style buildings, an environment most common for PCOs. Also, as said above, the total number of subscribers per PCO is dramatically smaller than for PCO competitors. Not more than four or five PCOs have subscriber counts higher than 30,000 with the overwhelming majority being less than 5,000 subscribers. Regardless, PCOs commonly offer subscribers products and services that they desire and at lower monthly rates than charged by the larger competitors.

Second, the money markets typically charge a higher rate of interest on money borrowed by a PCO compared with financing for the large providers. In addition, large providers have a much larger base of subscribers and this is considered to be an asset that is used as collateral for their loans and that reduces their rate of interest even further. This then means that the cost of capital and the duration of payback for large providers are dramatically different than for the PCO which must securitize a loan, comply with loan covenants and pay back the loan within the allotted time. In today's market that securitization comes from a cash flow that is made possible by the exclusive service provision in ROEs. Even then the cost of money and the duration required for payback for the PCO is significantly higher and longer than for the larger competitor. Without such securitization the loan would not be made in the first place.

### G. PCOs and DBS Providers

Perhaps it is useful to describe the relationship between PCOs and the DBS companies. First, the DBS companies have virtually no control over PCOs. The DBS providers have no equity or debt relationship with the PCO or the MDU. In fact, DBS providers are competitors of PCOs seeking contracts with MDUs. PCOs simply use the DBS providers as a means of acquiring programming content on a wholesale basis and reselling it on a retail basis. This is just like the longstanding business relationship between PCOs and the three program aggregators that bundle packages of programs from content providers and resell it to PCOs and they then to MDU consumers. It is also interesting that PCOs can buy the same content and bandwidth from Comcast, Verizon and other MVPDs. In most situations these program distribution relationships are for a limited duration, often three years, and are on a property-by-property basis. Because these relationships are beneficial for all parties involved a majority of PCOs enter into them.

There are several factors that distinguish the PCO business model from that of the DBS companies. For instance, PCOs increasingly offer the triple play whereas DBS companies do not. Also, the PCO proprietary workflow processes are focused on managing the relationship with the MDU owner and residents and this is rarely the case with DBS providers. From the PCO perspective the relationship between the DBS providers and the PCO is beneficial for the PCO and consequently for its MDU consumers.

### H. Other Unique PCO Improvements

There are numerous contributions that PCOs have made to the MVPD market in MDUs, including the following:

- PCOs were the first providers to offer competitive telephony services via PBX systems. Unfortunately, the telephone companies did not cooperate by sharing the cat-3 lines and cross-connects.
- PCOs were the first companies to offer Ethernet local area networks to MDU communities; even before cable modems were available.
- PCOs were on the cutting edge of helping new property developers to gain access to cable television when the much larger companies did not want to provide service to new and challenging greenfield, out-of-the-ground projects.
- PCOs were the first MVPDs that developed software applications that integrated the resident experience with the property management software system to fully deliver hotel-like interactive service.
- PCOs are on the forefront of developing and deploying mesh wireless networking products that allow residents to use their handheld wireless devices to be mobile throughout the entire community including inside and outside the buildings proper.

These and other innovations would not have occurred if exclusive contracts were not available to PCOs.

## III. Public Policy Reasons to Maintain PCOs in the MDU Marketplace

### A. Do PCOs Influence Competition?

The answer is yes. Even though PCOs are small by any definition and lack any market power or dominance, their influence is greater than subscriber count might suggest. PCOs are miniscule in contrast with MSOs and the common carriers. The competition they represent is directly with those MSOs and common carriers and can be documented. Without the presence of PCOs, the marketplace would be dominated by very large, mega-corporations. Actually, while generally the cable marketplace did not enjoy competition because MSOs do not compete with one another, the MDU marketplace has been a competition bright spot because of the ability of MDUs to enter exclusive contracts with PCOs. With PCOs in the marketplace, they offer MDUs a competitive alternative giving MDUs leverage in negotiations with MSOs and common carriers. However, if the large providers know that the MDU has an alternative, the entire negotiation process is altered.

Also, usually the large provider offers a take it or leave package of products, services and rates. If the MDU does not like the channel line-up, rates, or other characteristics of the offering the MDU has nowhere else to turn. However, if there is an alternative then the MDU can approach the negotiation in a far more advantageous way.

History has seen this replay itself with frequency. In localities where there is an alternative providing service, the MDU can evaluate proposals from each potential provider. Then it can better represent residents because it can say to each of the companies that might get the contract to serve that property that the MDU will only sign an ROE if it meets certain specifications.

That leverage in negotiations is brought about by two factors. First, that the MDU owner is negotiating from a position of strength because it represents hundreds or thousands of households, as opposed to a single subscriber. Add to that the second factor, presence in the market of a viable PCO, and this produces enhanced leverage in what the MDU can make available for its residents. Where alternatives such as PCOs do not exist that enhanced negotiation leverage is diminished or evaporates.

## B. Other Characteristics of PCO Competition

### 1. If PCOs are Not in the Marketplace Only the Large Survive and Reinforce Each Other

It is apparent that if PCOs disappear from the MVPD marketplace only the large providers will survive and control even more of that market than they presently do, which is the significant majority of all television households. That control is even more pronounced in the MDU space. If that occurs the MSOs and common carriers can simply reinforce each other by providing basically the same channel line-ups, same amenities and same rates.

We have experienced it time and time again. For instance, if a PCO is in an area serving MDUs and the large provider seeks to attract the MDU to sign an ROE using lower rates on a promotional basis as an incentive, the MDU consumers are protected due to the competition offered by the PCO. However, if a PCO is no longer providing service in that area, then the large provider raises its rates and there is nothing the MDU or residents can do about it.

A variation on that theme is that the large providers have frequently used tactics that may not violate the letter of Commission regulations but certainly do violate the Commission's intent to enhance competition. This clearly occurs today with MSOs and we fear the same will occur in the future with common carriers.

### 2. Tactics Used by MSOs

The proposal to extend the ban on exclusive contracts to include PCOs is based on the assumptions that: (a) exclusive access contracts involving PCOs bar access to a significant portion of MDU buildings nationally, and (b) consumers will benefit from the presence of two or more video providers in any given MDU building, competing on a unit-by-unit basis. Neither assumption is correct.

The Commission should realize that any multi-provider competition in most MDU buildings, insofar as it results from banning the use of exclusive access agreements by PCOs, is likely to turn out to be illusory and temporary, because the various resources available to large MSOs and even larger telephone companies give these incumbents both the ability and the incentive to undermine competition by driving PCOs out of the market.

In previous sections of these Comments, we have identified some of the advantages available to large telephone companies and cable MSOs when competing against PCOs. In this brief section we emphasize the fact that telephone and cable incumbents typically exploit their inherent advantages to undermine competition from PCOs in MDU buildings.

One of the most important advantages available to telephone companies stems from the fact that their ongoing provision of local telephone services already gives telephone companies access to most existing MDU buildings[2], and their established presence in buildings (together with their national brand-name recognition) gives these companies a huge advantage in dealings with MDU owners and residents. Moreover, telephone companies do not hesitate to leverage this inherent advantage in undermining competition from PCOs in video markets. A few instances of this behavior are described below:

AT&T provides its U-Verse video service over copper telephone wiring. Therefore, in any of the millions of MDU buildings in which AT&T provides basic voice service, it is able to and often does provide video service to residents without the building owner's knowledge or consent, and notwithstanding the existence of an exclusive service agreement with another MVPD. The notion that AT&T needs affirmative regulatory intervention to achieve this result is belied by AT&T's actual practice in the marketplace.

Verizon's FiOS video service does require the installation of at least some new infrastructure, and therefore cannot usually be accomplished without the building owner's knowledge. However, IMCC members report that Verizon technicians, knowing that the owner has signed an exclusive service agreement with an alternative MVPD, have on multiple occasions misrepresented (to building owners)

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[2] As pointed out in the Real Access Alliance's Comments (pp. 47-48), many jurisdictions require that MDU buildings be pre-wired for basic telephone service as a condition for granting a certificate of occupancy.

their FiOS installations as routine “upgrades” of the company’s existing telephone and/or high-speed data facilities.

As these examples clearly show, the claim that telephone companies need government intervention in the marketplace in order to gain access to MDU buildings is undermined by the fact that in most cases these companies already have access.

Once their video infrastructure is in place, the telephone companies deploy an array of strategies intended to drive competitors out of the market, especially pricing strategies. The enormous financial resources available to these companies, including the ability to cross-subsidize services, enable them to offer temporary, “promotional” below-cost pricing to MDU residents, even providing one or more services free of charge for some period of time. Presumably, the promotions end, and prices rise once the competition has been eliminated.

Finally, telephone incumbents are able to, and in fact do, leverage their dominance of regulated voice service markets into unregulated video markets – all the while appealing for special regulatory favors that would destroy the PCO industry. Attachment 9 to Verizon’s Comments is a letter to Verizon from a property owner’s attorney, which Verizon introduced to show that exclusive video access agreements block its access to MDU buildings. The letter states, “Verizon has taken the position that it will not provide telephone services to any of the three Properties unless it is also permitted to provide cable service to residents of the Properties.”

Attachment 9 is consistent with statements contained in a sworn Declaration submitted by Post Properties, Inc. and filed as Exhibit D to Comments of the Real Access Alliance: “Post had entered into voice-only exclusive marketing agreements with Verizon (then GTE) in about 1998, at a time when Verizon did not have the capability to provide data or video services. When those agreements expired, Verizon refused to renew the exclusive marketing agreements for voice unless Post also agreed to expand them to include data and video services." Both examples show an ILEC using its unique position as the monopoly provider of regulated telephone service to expand into traditionally unregulated video markets, and all the while complaining that regulatory intervention is needed to allow them to compete.

Finally, as the Commission well knows, IMCC has received many reports over the years of incumbents actively engaged in anti-competitive tactics to drive PCOs out of MDU buildings, including, in a typical scenario, cutting PCO-owned home run wires off at the wall, such that service can only be restored at a relatively high cost that small companies can ill afford. Cable and telephone incumbents virtually invite litigation from PCOs victimized by unfair tactics, knowing that forcing the smaller company to expend legal fees is just another effective tactic to be used against them.[3]

As these examples demonstrate, the telephone companies' claim that they are barred from a significant portion of the MDU market nationally rings hollow in light of the access to buildings they already have, by virtue of being the provider of basic telephone service in most areas of the country. The ILECs' further claim that government intervention is needed to preserve their competitive viability is undermined by these companies' well-documented tactics in utilizing their pre-

[3] MSOs often use scare tactics to prevent MDU residents from signing deals with PCOs, offer low priced deals for brief periods, and disconnect subs and claims it's the result of PCO construction.

existing access not to compete fairly, but to undermine competition from PCO alternatives, thereby depriving consumers of genuine choice among providers.

#### 3. If PCOs Do Not Survive, Residents in Small/Medium Sized MDUs Will be Particularly Hurt

When competition is diminished it has the greatest impact on the MDUs and residents that live in small and medium sized communities, they will be the most negatively effected. That is so because the owners of those properties, including associations for condominiums and PUDs, are less likely to know the nuances of ROE negotiations, they may not understand relevant technology issues and they are the most susceptible to the tactics of the large providers. Whenever that is the case, ROEs are entered into which are less advantageous for residents. Further, large MSOs are less likely to offer bulk contracts for discounted rates to smaller MDUs, as they prefer to charge retail rates to smaller MDUs. PCOs often provide discounted rates through bulk contracts in MDU communities that cannot obtain such discounts from MSOs.

### C. PCOs are Small and Without Market Power by Any Standard

IMCC included in its Comments in the NPRM stage of this proceeding that the Commission, and numerous other agencies of government, has recognized that small providers that possess no market power or dominance in any market have unique characteristics and that the Commission should continue to act to maintain that influence in the market. Unfortunately, the Media Bureau dismissed this view. We urge the Commission to reconsider that view and recognize how important these characteristics are to video competition.

In these Comments we have provided an expanded explanation of why these characteristics are beneficial for residents. We also document how the Commission has set ample precedents to encourage the presence and impact of such companies thru the adoption of regulations that facilitate their continued operations.

Please see section VI. B. 1 and 2 for a description of the diminimus PCO market power and those regulatory precedents. See pages 51.

### D. Exclusive Contracts Help Compensate for MSO and Common Carrier Advantages

The Commission recognized that MSOs had significant advantages over any other type of video providers and sought to facilitate entrance into the market by common carriers. Therefore, the Commission acted to reduce regulatory barriers to entry that the MSOs had enjoyed for many years. These actions demonstrated that the Commission had the responsibility and opportunity to act so that new providers could enhance competition and thereby benefit consumers. In this proceeding, IMCC encourages the Commission to make a similar decision so that PCOs can remain viable and provide comparable benefits to MDU residents.

PCOs recognize that the large providers enjoy many advantages and do not urge the Commission to eliminate those advantages, simply to recognize that those advantages are present and act to provide a regulatory environment that is conducive to PCO viability in order to help accomplish the objective of enhanced video competition.

The advantages enjoyed by large providers include those that are of a financial and marketing variety. Also, there are numerous examples of regulatory treatment that have produced a playing field tilted to the advantage of the very large companies.

1. **Financial and Marketing Resources**

a. Programming Costs

The cost to acquire programming is a major portion of operating expenses for PCOs, some 30% of all expenditures. Whereas the large providers are able to use their subscriber size to receive discounts from content distributors, PCOs do not have this opportunity and pay much more for programming. Also, numerous of the largest MSOs own or are in business relationships with content providers. There are many means by which those relationships inure to the advantage of MSOs and to the disadvantage of any other cable operator.

b. Cross Subsidization

IMCC asserts that because MSOs and common carriers have very large bases of customers, usually with a city or regional and sometimes national footprint they have a number of subscribers that makes the total number of subscribers for all PCOs appear miniscule in comparison. These footprints produce revenue that can be used for many purposes. These deep pockets allow the large providers to cross subsidize operations among areas and products and to absorb losses. Again, PCOs are at a considerable disadvantage because none of this is possible for them. They must operate so that each MDU project is self-sustaining.

c. Advertising and marketing

As the above indicates, the large operators produce capital to acquire advertising and offer promotions that PCOs can not match. This then allows them to buy radio, television, print and other types of customer communication. Included in this array of opportunities, the large companies use door fees and revenue sharing to entice MDU owners to select them as the service provider. This is not in violation of law or regulations but it certainly has a major impact on consumers that PCOs cannot match.

d. The above factors produce longevity

Massive amounts of capital, operational cross subsidies and the use of advertising provide the large operators with staying power. They can withstand years of losses yet remain in the market. This longevity is not illegal but makes it very difficult for any smaller MVPD to offer competition over the long term.

2. Regulatory Advantages

The Commission has accorded large MSOs and common carriers many regulatory advantages that those companies have used to enter markets, to drive the competition out of business and then to make profits that further sustain them. PCOs are put at a disadvantage due to decisions the Commission has made. These decisions have made it even more difficult for PCOs to remain as viable competitors. IMCC views that situation as one in which they have not been given equal opportunity to succeed. That is not regulatory parity.

a. Single Franchise/Single Provider

The Commission adopted a regulatory regime that has given MSOs a virtual monopoly for many years. Local Authorities have awarded franchises to only one operator at a time. This was done some 40 years ago, because the Commission correctly recognized the importance of a national cable television system. However, that regime of governmentally anointed and protected providers made it impossible for competitors to generate comparable bases of customers and revenue. That is why, until recently, the MSO size and financial stability was virtually guaranteed with governmental blessing.

b. Right to Cross-Public-Rights-of-Ways

A very important element of that regulatory regime has been that if a company gains a franchise-monopoly to provide service it is also given the right to cross public-rights-of-way ("PROWs"). Therefore, those companies with that right can sell their products to any resident, on any street, in any neighborhood in the entire Franchise Authority jurisdiction. Being allowed to cross PROWs has been a massive advantage for those companies and it was a right given by local government with the blessing and direction of the Commission. PCOs can not cross PROWs which is a major disadvantage. It also is another reason why the continued use of exclusive access provisions is rational and reasonable. That should be a component of the Commission's actions to implement a regulatory regime that allows for equity of opportunity if not regulatory parity. Steps have been taken so that some new providers also have that advantage. Those steps do not benefit PCOs.

c. No Program Access Rules/Predatory Pricing

Regulatory steps have been taken that retard the ability of PCOs to compete effectively. For instance, the Commission eliminated critical portions of the Program

Access Rules which has resulted in a situation that even when the large companies undercut competitors by offering products far under the cost to provide those products it is in reality to prove. That also applies to when the MSO has only reduced its rates under what the PCO can offer. This may be viewed as beneficial for the customer but not if that reduced rate is for a short period to time, just long enough to make it financially impossible for the PCO to continue to provide service in that MDU. Due to the Commission's decisions, the only redress of this tactic is to sue the MSO under the antitrust law principle of "predatory pricing", the standard of which is quite impossible for anyone to prove. Beyond that, the cost to pursue such litigation is prohibitive and the duration of such action will be years.

d. Less Than Adequate Inside Wiring Rules

When the Commission adopted the MDU Inside Wiring Rules it should have served as a major stimulant for competition in MDUs. IMCC was a strong advocate of the Commission's adoption of those rules. However, as much as we sought such rules we have been frustrated by the way numerous MSOs have impeded implementation of the rules. Often times they have not followed the letter of the law, but in many more instances they have, seemingly with full awareness, ignored the intent of the Commission. Regardless, this component of a regulatory regime seeking to stimulate competition has been utilized successfully by PCOs in many situations. Regardless, it is frustrating that MSOs have so frequently and blatantly impeded their application and the FCC has done virtually nothing to make the rules more effective or to force the MSOs to abide by their requirements.

e. Loss of 18 GHz Microwave Transmission

The FCC recognized that PCOs can enhance competition and that steps could be taken to facilitate the ability of PCOs to serve larger bases of customers. To help accomplish that objective the Commission adopted a radio spectrum allocation that allowed PCOs to cross PROWs via micro-wave transmission. In the 18 GHz portion of the spectrum PCOs were allowed to transmit video signals from one MDU location to other MDUs, thereby reducing PCO costs which allowed them to maintain lower customer costs. However, the FCC withdrew that right and did so in a very clumsy way that damaged many PCOs and reduced their ability to compete. First, the Commission granted this right to PCOs, then it withdrew that right, then it said it had made a mistake and reinstated the right and then it withdrew the right, again. This example of regulatory go-to-me-come-from-me was costly for PCOs because they made investments based on an assumption that the Commission would abide by its initial decision. Then, when the right was extinguished the investments to acquire equipment and the labor cost to install and operate the systems were a waste of valued resources. Beyond that, no PCO was reimbursed or made whole by this Commission indecision. That has nothing to do with parity. It does go to the heart of regulatory equity.

f. Mandatory Access

Some 16 states with significant populations residing in MDUs, including New York, Massachusetts, Pennsylvania, Ohio and the District of Columbia, have legislated mandatory access. Mandatory access laws generally provide franchised cable operators with a legal right to install and maintain cable wiring in MDU buildings and provide cable service to residents of the MDU, even over the objections of MDU owners. No mandatory access provision mandates access by competitive providers such as PCOs.

Such state mandatory access laws effectively eliminate the ability of MDU owners to enter into an exclusive right of entry with competitive providers of cable. This type of mandatory access gives MSO providers an unfair advantage in reaching potential customers that will never be available to PCOs.

In 1990, for example, the Commission stated that "discriminatory local mandatory access laws can operate to hinder the growth of alternative distribution services." *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring*, FCC 03-9, released January 29, 2003 at ¶36 ("*Home Wiring First Order on Reconsideration*"), *quoting In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962, 5034-5035 (1990), ¶¶ 137-140. The Commission later, again in the context of state mandatory access laws, "acknowledged its concern about 'disparate regulation of MVPDs that unfairly skew competition in the multichannel video programming marketplace.'" *Id, quoting, Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, 13 FCC Rcd 3659, 3748 ¶190 (1997). Not one mandatory access jurisdiction has heeded the Commission's call for an evaluation of the competitive effects of their access statutes. *Id, citing, Report and Order*, 13 FCC Rcd at 3748, ¶ 189.

The Commission has not only "long recognized the anti-competitive effects of such discriminatory mandatory access statutes" but conceded that it possesses evidence supporting the assertion that less competition exists in the MDU market place in mandatory access states. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring*, FCC 03-9, released January 29, 2003 at ¶36, 37.

The following Commission opinion is as true today as it was when made in 2003:

> We continue to believe that mandatory access laws may impede competition in the MDU marketplace and that they tend to preclude alternative (non-cable) MVPDs from executing MDU contracts. This is due to the fact that most mandatory access laws give the franchised cable operator a legal right to wire and remain in an MDU.92 The predictable result is that competitive providers are less likely to take the financial risk of entering, or to secure the necessary financial backing to enter, the MDU marketplace in a mandatory access state.

*Home Wiring First Order on Reconsideration* at ¶38 (footnotes omitted).

If the Commission is truly interested in establishing regulatory parity then it will have to take one of two steps: (1) preempt state mandatory access laws or (2) mandate that such laws apply to all MVPDs (franchised or not – which it has effectively accomplished by the implementation of its OTARD rules) likely through a federal mandatory access requirement.

### E. Examples of How the Commission Has Treated One Set of Providers Differently-Not Parity

In this proceeding, questions have been raised about why all MVPDs should not be given identical regulatory treatment. IMCC has provided a description of why and how the Commission has, in numerous instances, accorded some providers treatment that is different than that accorded other providers. In essence, these regulatory decisions were based on the Commission's desire to achieve effective equity, which can produce benefits for consumers, rather than strict adherence to the principle of parity which can unintentionally reduce competition and thereby reduce consumer benefits.

IMCC provides a description and a delineation of precedents that can be found at section VI. B. 1 and 2. See pages 52.

## IV. Bulk Contracts

The Commission inquired whether it should prohibit bulk contracts.[4] The Commission commented that such bulk contracts may be exclusive "because MDU owners agree to these arrangements with only one MVPD, barring others from a similar arrangement." The Commission then acknowledged that while residents could select a competitive video provider, because of the "bulk billing" nature of the contract, residents would have to continue paying a fee to the provider with the bulk billing contract as well as pay a subscription fee to the new service provider."[5] The Commission inquired whether such contracts are between MDUs and providers, between MDUs and residents, or both, and to what extent consumers are dissuaded from switching providers because of such contracts.

It is IMCC's position that the Commission should not prohibit nor engage in any regulatory action with respect to bulk contracts. This is perhaps the most competitive area of the cable marketplace and is working. As a primary matter, the

[4] See ¶63.
[5] See ¶64.

Commission needs to obtain a much more thorough understanding of bulk contracts before embarking on any type of regulation, let alone prohibiting such contracts. Such contracts are not only crucial to PCOs ability to compete, but they offer substantial benefits to consumers both in terms of discounted rates and unique specialized services. MDUs and PCOs could provide hundreds of stories of consumers and providers benefiting under bulk contracts. Further, federal law has long recognized the benefits of bulk contracts and authorizes expressly such contracts. As a final matter, IMCC would note that the few concerns about perceived anti-competitive effects of bulk contracts are often issues that are addressed by States and local governments for the health, safety and welfare of MDU residents. Typically, these involve the relationship between the MDU owner and its residents, as opposed to the MDU and the video provider. Such issues are better addressed by States and local governments, as opposed to the Commission, and any action by the Commission may inadvertently preempt such State and local laws.

What the Commission failed to acknowledge in the NPRM, however, is that bulk contracts - by definition - afford lower rates for the services provided on a bulk basis than what residents would pay on an individual retail basis – even in the face of competition. It is guaranteed that if existing bulk contracts are eliminated, consumers in MDUs will pay higher rates for the services provided on a bulk basis. Even if video competition eventually comes to the area of their MDU, retail rates will still be substantially higher than the discounted rates afforded under bulk contracts. When you factor in added discounts provided for broadband Internet and voice services that may be provided on a bulk basis, it becomes even more evident that consumers are much better under bulk contracts than under retail rates. Further, consumers will lose the benefit of specialized services typically provided under a bulk contract that are vital to their health, safety and welfare. Many consumers under bulk contracts do in fact subscribe to services offered by other MVPDs that are not offered by their bulk service provider. They have made that decision. Those that decide not to subscribe to another MVPD do so for one simple reason, the services being provided by the other MVPD do not offer advantages and would cost more than the services offered by the bulk service provider. Again, this is a decision consumers are free to make.[6]

In prior comments submitted in response to the first NPRM, bulk contracts were generally supported because of the tremendous benefits they offer to both consumers in MDUs and to providers, while leaving consumers free to subscribe to services of other providers.[7] Further, in entering into bulk contracts, MDUs typically

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[6] The Commission has often rejected the assertion that consumers in MDUs do not subscribe to services of other MVPDs, including DBS service, and has found the presence of effective competition even where significant numbers of consumers were under bulk contracts. Thus, according to Commission precedent, the existence of bulk contracts has no bearing on whether consumers in such areas can obtain the benefits of effective competition. *See e.g. Bright House Networks, LLC: Petition for Determination of Effective Competition in Winter Haven, FL*, 22 FCC Rcd 4378 (MB 2007)(Bright House demonstrated effective competition based on DBS penetration despite nearly 30% of city's households under bulk contracts);

[7] Even AT&T which vehemently opposed exclusive contracts, supported bulk contracts and recognized that bulk contracts do not prevent competitive MVPDs. In its Reply Comments, AT&T favored banning exclusive contracts with MDUs while supporting bulk contacts: "the comments make clear that legitimate concerns of video service providers to manage the risks of their investments and of MDU owners to provide real benefits to their tenants can be accommodated with alternative arrangements such as marketing agreements and bulk billing arrangements that MDU owners concede they prefer, that do not categorically bar competitive offerings and consumer choice, and that would be unaffected by a limited ban on arrangements that require absolute exclusivity." *Reply Comments of AT&T Inc.*, at 1-2, 3-4 (benefits can be achieved through "bulk discount arrangements"); 10 (supporting bulk billing contracts); 11 (recognizing that residents under bulk contracts can choose another provider and will do so if the alternative offer is compelling).

have many alternative MVPDs from which to choose. Not only may they decide to obtain services from the incumbent MSO, but because most MDUs are on private property that does not cross public rights-of-way, they may also select from any of a number of PCOs or DBS providers. And MDUs have become very sophisticated in leveraging their buying power in this highly competitive environment, not only to obtain excellent cable services at deep discounts, but also in obtaining voice and broadband services and other services – such as WiFi, security, intranet, concierge, and an entire host of communications related services for the benefit of their residents. With the convergence of these services, more recent bulk contracts simply state all the services the provider is to provide, and the bulk fee per unit. The contracts do not break down how much of the bulk fee is for cable versus other services provided on a bulk basis. Thus, if the Commission were to regulate bulk contracts for cable, it would be very difficult to determine exactly what aspects of such contracts were affected by such regulations.

## A. Explanation of Bulk Contracts and How They Benefit PCOs and Consumers

The Commission was correct to ask how bulk contracts are formed and between what parties. There are really two contractual or legal relationships involved in the creation and operation of a cable bulk contract. The first contract is between the MDU owner, typically a condominium or homeowner association or landlord, and the resident or unit owner.[8] In such contract, the MDU owner sets forth various services that the MDU owner will provide for the benefit of all residents or unit owners as a common expense. These are the services where it is advantageous for the MDU owner to arrange for such services, rather than individual residents or unit owners arranging for such services on their own. Such services typically include management of the MDU and common areas, landscaping, trash removal, maintenance, electricity, gas, water and sewer, swimming pools and recreational facilities, communications, cable television, laundry facilities, security and other such services. Such contracts may provide that the MDU "may" arrange for such services, or "must" arrange for such services. Often such contractual provisions between MDUs and their residents are regulated by States or local governments, which set forth services that MDU owners must provide, may provide, and cannot provide to residents and other terms that must be incorporated into such contracts. In the case of new MDU properties, developers are often required to file documents with a regulating government – either on a state or local level – indicating the services that it will be providing to unit owners. Such documents become part of the government's approval of the project.

To provide such bulk services, the MDU owner creates a budget and then assesses each unit owner or resident to cover all such common expenses. Assessments are payable on a monthly or other basis – as established in the contract or state law – and may or may not be broken down to show how much is assessed for each common

[8] Such contract may take the form of a condominium or homeowner association's declarations and covenants, which the MDU and unit owners when they purchase their units, contractually and legally accept and must abide by, or leases.

expense item. If a unit owner does not pay the assessment, typically the MDU owner has several remedies provided in the contract and/or state or local law, which may include eviction in the case of tenants or placing a lien on the unit in the case of condominium/homeowner associations. Many of these details of the relationship between the MDU owner and individual unit owners are regulated by states and local governments.[9] In the same manner, if the contractual or legal relationship between the MDU and the unit owner does not allow the MDU to provide certain services on a bulk basis, including cable services, it may not do so. Accordingly, the first contractual or legal relationship to create a bulk contract must be between the MDU and the unit owner and such relationship is typically regulated by state and local governments.

Any interference by the Commission with such contracts and legal relationships would change the entire dynamic of the MDU/resident relationship; including the pricing of MDU units (whether rental apartments, condominiums, assisted living facilities, university housing, or single family homes in a PUD), services provided by MDU owners to all residents, budgets for MDU owners, and assessments for millions of consumers who presently and in the future enjoy discounted prices for services provided on a bulk basis.[10]

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[9] For example, Florida, which because of the large number of condominium and homeowner MDUs has a very comprehensive regulatory scheme governing the relationships between MDUs and unit owners and includes detailed regulations governing assessing unit owners for cable television and provides that associations may not assess unit owners who are blind, deaf, hard of hearing, or disabled for such services. See Section 718.115, Florida Statutes.

[10] These relationships are often tenuous and a slippery slope of regulation. If, for example, the Commission interferes with the MDU/resident relationship regarding bulk cable services in the name of increased competition, the MDU or resident industry will undoubtedly use such action as support to

The second contractual relationship involved in cable bulk contracts is between the MDU owner and the MVPD. Under a bulk contract, the unit owner does not have a contractual relationship with the MVPD. Thus, the unit owner does not pay the MVPD directly (unless such resident decides to subscribe to non-bulk services offered by the MVPD). Rather, the contract with the MVPD is with the MDU. The MVPD sends one bill to the MDU for all the units, and is paid by the MDU. Because the MVPD does not have to deal with billing and collection costs for all units individually, it realizes substantial cost savings, which is a large part of the reason it is able to offer discounted rates to MDUs. The MDU owner pays the MVPD from assessments it collects.

It seems that in its NPRM, when the Commission discussed prohibiting bulk cable contracts, it focused solely on this second contractual relationship. However, in actuality the Commission needs to consider that it will be interfering with the contractual relationship between the unit owner and MDU owner as well, often preempting state or local law in the process.

With respect to existing bulk contracts, the Commission's elimination of existing bulk contracts would be particularly devastating for PCOs. While MSOs actually may not be harmed by so-called "de-bulking" existing MDUs (since their rates will increase to retail levels and they will be able to cease providing non-standard services they do not offer to individual subscribers), the termination of such bulk contracts for PCOs will in many cases amount to a default on their financing

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expand such action to other types of services. After all, if the policy is to create competition, why should that be limited only to cable services provided on a bulk basis?

commitments with their lenders. Further, without bulk contracts, MSOs may seek to enter the more lucrative MDUs to compete head to head with PCOs on a retail basis. Even if the loss of the bulk contract is not an immediate default of their financing, this will result in PCOs losing revenue to invest in other projects and eventually they will not be able to compete. To protect financing for PCOs, and consumers from immediate increases in rates and to avoid disrupting the entire MDU and MVPD marketplaces, nothing the Commission does should affect existing bulk contracts.[11]

With respect to prospective action, bulk contracts are the basis for discounted rates and specialized services for consumers. They afford consumers in MDUs the ability to negotiate with leverage with many, many MVPDs. A prospective ban on bulk contracts would harm consumers by denying them the ability to obtain such services at a discounted rate and specialized services. A ban on bulk contracts will harm MDUs by eliminating many services they obtain for the benefit of their residents, including security, closed circuit monitoring, community channels[12], WiFi,

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[11] In prior rulemakings which changed regulations governing bulk contracts, the Commission was always careful to grandfather existing bulk contracts. For example, in adopting new rules to implement a uniform rate structure for bulk contracts, the Commission was careful to grandfather existing contracts that would otherwise be in violation of the new rules. The Commission stated: "We believe that the elimination of existing contracts would be unnecessarily disruptive to those subscribers receiving discounts, as well as to those cable companies offering the discounts." *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation Buy-Through Prohibition*, 9 FCC Rcd 4316 ¶22 (1994)(allowing existing bulk contracts with MDUs entered into on or before April 1, 1993, to remain in effect until their expiration date). Similarly, the Commission addressed exclusive contracts for telecommunications services in commercial multi-tenant properties it prohibited such exclusive contracts on a prospective basis only; it did not affect existing contracts. *See Promotion Of Competitive Networks And Local Telecommunications Markets, First Report And Order And Further Notice Of Proposed Rule Making*, 15 FCC Rcd 22983, 22996-97 ¶27 (2000) .

[12] Ironically, the Commission and its partners in the DTV coalition have identified such MDU community channels as an excellent method to inform consumers, particularly minorities and senior citizens, about the digital conversion taking place in 2009. Such MDU community channels provide important health and safety information, particularly during emergency situations. They are entirely

free Broadband access in common areas, and other such "amenities" provided pursuant to bulk contracts. Finally, plain and simple, a ban on bulk contracts will put PCOs and many other MVPD competitors out of business, losing an important competitive alternative.

### B. Federal Law Has Long Supported and Authorized Bulk Contracts

It seems that ever since paid television programming services were first introduced, consumers were looking for ways to obtain cheaper prices. Bulk contracts in MDUs became an easy method. By many consumers getting together and leveraging their buying power, and by service providers realizing cost savings and other advantages, it was possible to offer discount rates from what each consumer would pay on his or her own.

In 1992, when Congress adopted new rate regulations and uniform rate structures for cable services,[13] it gave LFA broad powers to regulate rates. However, Congress understood that no regulators -- including LFAs -- would want to eliminate discounts and thus, continued the practice from the Cable Communications Policy Act of 1984[14] of recognizing and supporting bulk discounts for MDUs as an exception to the uniform rate requirement. In implementing the 92 Act, the Commission recognized that providers can realize cost efficiencies by serving MDUs and did not wish to foreclose the prospect that such savings would be passed on to consumers.

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the result of exclusive ROEs or bulk contracts and will cease to exist if the Commission prohibits such contracts.

[13] Cable Television Consumer Protection and Competition Act of 1992 ("92 Act"), Public Law 102-385, 106 Stat. 1460 (1992).

[14] Public Law 98-549.

The Commission determined that cable operators may offer different bulk rates to MDUs of different sizes and may vary bulk rates based on the duration of the contract, provided the operator could justify the rate differences based on relative cost savings.[15] The Commission found: "that uniform, non-predatory bulk discounts to multiple dwelling units, including apartment buildings, hotels, condominium associations, hospitals, universities and trailer parks, could form a valid basis for distinctions [in rates] among subscribers."[16]

After the 92 Act, Congress again revisited bulk contracts in the Telecommunications Act of 1996 .[17] As part of the, Congress amended Section 623(d) of the Communications Act's uniform rate structure requirement for MDUs by adding the following language:

> Bulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit.[18]

The House Commerce Committee proposed this statutory change because it wanted to allow cable providers to be free to offer lower rates to MDUs in response to

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[15] 47 C.F.R. §76.984; *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation*, MM Docket 92-266, 8 FCC Rcd 5631, ¶¶421-425 (1993).

[16] *SBC Media Ventures, Inc. Appeal of Local Rate Order of Montgomery County, MD*, 9 FCC Rcd 7175 ¶9 (1994)(finding that the county could regulate bulk rates but could not order all bulk rates to the lowest bulk rate).

[17] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[18] 47 U.S.C. §543(d) (1996). The legislative history makes clear that Congress intended to encourage "small, nimble companies and entrepreneurs" to enter the marketplace, through such opportunities as bulk contracts with MDUs. See Statement of Senator Pressler, Congressional Record – Senate, 142 Cong. Rec. S 687 (Feb. 1, 1996).

competition.[19] Accordingly, federal law authorizes expressly bulk contracts with MDUs. In implementing the 96 Act, the Commission similarly addressed concerns about the "competitive impact" of bulk billing arrangements, but declined to regulate bulk contracts so as not to "create any competitive advantages or disadvantages or restrict consumer choice in services or service providers by imposing rules regarding the billing arrangements used by cable operators."[20]

Congress and the Commission plainly recognized the benefits of bulk contracts to both consumers and providers and the competitive nature of the MDU marketplace. Nothing has changed since the 96 Act to alter federal law's allowance of bulk contracts, or the expressed policy not to regulate such contracts to give maximum flexibility to both MDUs and providers in entering into such contracts. The Commission's various proceedings on home-run wiring in MDUs to implement the deregulatory policies of the Telecommunications Act of 1996, further recognized the benefits of bulk contracts and rejected arguments to restrict or to prohibit MDUs' from entering into such bulk contracts.[21]

### C. Preempting State and Local Laws

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[19] H.R. Rep. No. 204(1), 104th Cong. 1st Sess. 109 (1995)(uniform rate structure did "not serve consumers well by effectively prohibiting cable operators from offering *lower* prices in an MDU" in the face of competition in that MDU).

[20] *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296 ¶102 (1999).

[21] See, e.g. *Telecommunications Services Inside Wiring; Customer Premises Equipment; In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring*, 13 FCC Rcd 3659 (1997); *Telecommunications Services Inside Wiring; Customer Premises Equipment; In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring*, 18 FCC Rcd 1342 (2003).

As discussed in many comments, many states have laws governing the rights of residents in MDUs to obtain services from franchised MVPDs of their choice, despite exclusive or bulk contracts.[22] In response to the first NPRM, several comments raised various issues with bulk contracts. For example, some residents in MDUs raised issues with being subject to a bulk contract entered by the developer before it turned over control of the association to the unit owners. Many states and local governments address such issues that concern the relationship between the MDU owner and the resident.[23] Even associations that are under exclusive contracts entered by a developer prior to the unit owners taking over the association requested that the Commission permit exclusive contracts entered into by an association controlled by its homeowners/members "as this provides the members/residents with increased bargaining power to promote market competition."[24]

The very existence of most homeowner associations, whether in condominium or PUDs, is purely a creation of state law. States and local governments already regulate many aspects of the relationships between such associations and unit owners. In States with significant numbers of MDUs, such state regulatory schemes are often hundreds of pages and there are state agencies established solely to address

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[22] See *Supra* Section III. D2(F); Comcast maintained that there are eighteen (18) states that have some form of mandatory access laws that allow residents in MDUs to subscribe to franchised cable operators or other MVPDs of their choice, notwithstanding exclusive contracts that may have been entered by the MDU owners. See Comments of Comcast Corporation, at 21 n. 43 filed July 2, 2007.

[23] Many states afford condominium unit owners the right to terminate contracts entered by the developer prior to turnover of the condominium association to the unit owners, for a wide variety of services, including but not limited to cable television. See e.g., Cal. Code Regs. tit. 10, § 2792.21 (b)(1)(E); Fla. Stats. §§718.115, 718.302; Article 32-A of the Horizontal Property Law of Puerto Rico, Law No. 103.

[24] Comments submitted by Plaza Midtown Homeowners Association Board of Directors, December 18, 2007.

such issues. Of course, landlord/tenant relationships are similarly matters of state and local law. States and local governments have adopted such laws under their broad powers to adopt laws for the health, safety and welfare of their residents. The types of issues covered by such state laws vary from requiring MDU associations to obtain competitive bids for services offered on a bulk basis, including cable services, to where employees of service vendors, including cable services, may park within MDUs. It is not appropriate for the Commission to intervene and preempt inadvertently laws that regulate services provided to MDUs or the relationships between MDUs and their residents.

Moreover, even where the issues are simply between MDUs and MVPDs, state law often controls such issues under general contract principles. For example, perpetual contracts are generally prohibited under general contract law principles. State law also addresses situations where cable service providers compete unfairly or harm consumers.[25]

The Commission should be cautious of interfering with bulk contracts with MDUs for fear of inadvertently preempting State and local laws in areas that Congress and the Commission intended to leave -- and should be left -- to the States to regulate.[26]

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[25] Communications Act does not preempt state law prohibiting negative option billing by cable providers. *Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995), cert denied, 516 U.S. 1112.

[26] See also 47 U.S.C. §541 ("nothing in this subchapter shall be construed to affect the authority of any State to license or otherwise regulate any facility or combination of facilities which services only subscribers in one or more multiple unit dwellings under common ownership, control, or management and which does not use any public rights-of-way."); 47 U.S.C. §556(a) (recognizing state and local authority over matters of public health, safety and welfare).

In summary, bulk contracts afford substantial benefits to MVPDs, PCOs, MDUs and consumers within MDUs. They allow PCOs to compete with large MSOs and common carriers. Most importantly, bulk contracts foster competition and allow consumers to join together to leverage their buying power and obtain better services, at discounted rates from a larger selection of MVPDs than what they would be able to obtain on their own. Prohibiting bulk contracts would not only decrease competition, it would entirely disrupt the relationships between MDUs and their residents and affect state and local government law. IMCC submits that the Commission should take no action that would affect or impact bulk contracts.

## V. Marketing Agreements

MDU owners and Homeowners Associations working with PCOs endeavor to produce quality communications products and services for residents. To do so, they need to coordinate numerous different factors. One important element in that effort is cost control sufficient enough to maintain the viability of the communications operator while at the same time assuring residents that they receive quality services at reasonable rates. Marketing Agreements are a part of how MDUs and PCOs work together to accomplish that objective. This then benefits the residents.

This type of agreement is used in numerous industries. For instance, in the food sales business stores agree to put one producer's products in preferential shelf locations, to identify those products in advertising, to offer product coupons and other techniques. Obviously these marketing techniques benefit the producer and the store owner because those benefits are sold, not given away. This is so because they have market value. This added revenue helps the store owner defray operating expenses which can keep its costs below what they otherwise would have been which then benefits consumers through lower food costs. This helps the owner increase its margins which produces revenue to help it stay in business. The MDU and PCO businesses are basically the same. MDU owners enter into these agreements to help them recoup the significant communications infrastructure costs that are made when they build new communities and make it possible to upgrade plant and equipment in existing communities. This is particularly true given the rapidly changing technology landscape with its inherent cost increases.

Marketing products is basically consumer education. That is expensive and must be an ongoing process. In this equation the MDU, in the above example the store owner, recognizes that the product providers, the PCO or MSO or common carrier, can spend their advertising budgets on print, radio, television or other means of consumer education, each of which leads to increased sales. The providers can spend that budget in other ways, one of which is to pay the store owner a set amount of money for benefits it receives, listed above. Another way to accomplish the same objective is for the producer, the PCO, to pay the store, the MDU, a percentage of increased sales revenue. Each approach benefits each component in the chain, the product producer, the store owner and the end use consumer. If these agreements are prohibited the revenue derived from them would be lost; store owner costs would not be defrayed and product prices would have to be increased.

In the MDU - product provider - end user chain, the clearest example is when the owner is building a new community or is required to install new infrastructure to meet customer demand. In each situation there is a cost that must be borne by some or all of the three parties in the chain. Marketing Agreements are one means of defraying those costs. They can be structured in a way that benefits residents through their increased understanding of products and through lower monthly rates. Without this exchange of values the MDU or PCO must take on those costs and reduce their margins or the consumer will pay more, none of those options is helpful for any party in the chain.

For instance, when wiring or fiber needs to be upgraded the MDU states to the PCO that the MDU can not absorb the total cost of doing so. This is for two reasons. First, often times the MDU owner is not producing a revenue flow which allows such investment or it recognizes it is not in the business of installing infrastructure or maintaining it. It is in the business of renting apartments. In this real world example, the MDU owner then tells the product providers that it must pay for all infrastructure installation or upgrades. This is often beyond the capital expenditure budget of the PCO. Regardless, the installation and upgrades must be done. Then those parties agree that if the PCO, or MSO or common carrier, absorbs that cost then the MDU will grant it certain rights, including the exclusive right to advertise its products on the properties. It is an exchange of values benefiting all parties in the chain. If this is not allowed to occur the PCO and the MDU face higher costs which can only be recouped through higher resident rents. That is strongly avoided by the MDU because higher rents put the MDU at a competitive disadvantage with other MDUs in that market which means that MDU community will become less in demand by residents, which will require the MDU to increase rents for the deceased number of residents. If there is a lower occupancy rate there is less opportunity for the PCO to make sales, that reduces revenue per unit and that then means they must exit the community or raise rates. It is a vicious circle. Conversely, when such agreements produce increased revenue per unit or subscriber then the PCO is in a position to keep end user rates lower which benefits MDU owners because they can then keep rental rates lower than they otherwise would have been. This pleases the renter and that leads to higher building occupancy levels which produce higher MDU revenue which allows them to keep rents lower or to use that revenue for other enhancements in the community.

Another factor in this chain is that the PCO is almost certainly competing against the MSO or common carrier. Those companies have large consumer education budgets that can place their company name and products before the consumer in many ways including print and electronic media, mailings and so forth. It is clear that the larger providers have no shortage of means to communicate with consumers.

Exclusive Marketing Agreements are utilized because they respond to an economic reality faced by the MDU and the PCO. They also benefit residents through the provision of information and the agreements help defray costs which helps keep video rates below what they otherwise would have been and/or help keep rental rates lower.

## VI. The Commission Lacks Authority To Prohibit Private Cable Operator Exclusivity Clauses For Video Programming

Whatever the Commission's authority may be with respect to the prohibition of exclusivity clauses for video programming entered into by cable operators[27] – and, as a recent filing by the National Cable Telecommunications Association ("NCTA") makes clear,[28] that authority is being challenged and has yet to be confirmed by any court – there can be little doubt that the Commission lacks authority to extend this prohibition to PCOs. In fact, the record established in the proceeding that resulted in NCTA's filing and in the issuance of the FNPRM – a record which unquestionably was robust and contained a wide range of viewpoints – provides no rational basis for imposing a singular, blanket prohibition on all PCOs. This holds true for all PCOs, even those that are common carriers or affiliates of common carriers. As previously noted, the video services of PCOs – which generally require exclusivity to be commercially viable – provide substantial benefits to consumers in the form of, among other things, lower prices and tailored programming selections. Prohibiting exclusivity for PCOs would prevent consumers from realizing these benefits, and, as explained more fully below, would reach beyond the Commission's authority and thwart its longstanding policy of encouraging competitive entry by smaller providers of video and other services.

### A. The Commission Lacks the Authority to Prohibit Exclusivity Clauses for PCOs

#### 1. Section 628 Does Not Apply to PCOs and No Other Provision in the Act Authorizes the Commission to Prohibit Exclusivity Clauses for PCOs

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[27] *See* 47 U.S.C. § 522(5) (defining a "cable operator" as an entity that "provides cable service over a cable system," with "cable system" defined in turn as a facility that uses public rights-of-way).

[28] *See* Request for Stay Pending Judicial Review, MB Docket No. 07-51, filed December 11, 2007.

There is no question that the Commission's authority under Section 628(b) – the principle provision on which the Commission relied to prohibit cable operators from entering into or enforcing exclusivity clauses[29] – does not extend to PCOs generally. The FNPRM itself made this conclusion abundantly clear by noting that the Order "is limited to those MVPDs covered by Section 628."[30] Although the Commission sought comment in the FNPRM on its authority to regulate the use of exclusivity clauses by PCOs pursuant to other provisions, it failed to name – even on a preliminary basis – a single section in the Act that might serve as an explicit "statutory foundation"[31] for extending the exclusivity clause prohibition to PCOs.[32]

This is not surprising. To the extent the Communications Act authorizes the Commission to regulate PCOs at all, the Act does so in a manner that limits the

[29] *See* Order ¶¶ 27, 32.

[30] FNPRM ¶ 61.

[31] *American Library Ass'n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005). While the FNPRM asked generally if the Commission might have "authority to regulate the use of exclusivity clauses by MVPD providers not subject to Section 628," it failed to identify a single provision that would grant it such authority and sought comment only on the Commission's potential authority over DBS providers pursuant to Section 335 of the Act, as well as potential "authority over DBS and other providers" under Title III generally, Title VI, or ancillary authority. FNPRM ¶ 62.

[32] *See* FNPRM ¶ 62. IMCC notes that the Commission may have inadvertently extended the prohibition to some PCOs by reference in the Order to Section 628(j) of the Cable Act, 47 U.S.C. § 548(j). IMCC thus supports the Petition for Clarification filed today in this docket by Shenandoah Telecommunications Company ("Shentel"), which asks the Commission to clarify that the rules adopted in the Order do not apply to any PCO that does not occupy a public right-of-way for its provision of video service, regardless of any such PCO's potential status as a common carrier or as the affiliate of a common carrier. In the Order, the Commission explicitly concluded that the current prohibition on exclusivity clauses was to be "limited to those MVPDs covered by Section 628(b) [and] does not reach PCOs or DBS providers because we do not have an adequate record on which to decide whether such a prohibition is warranted for non-cable operators." Order ¶ 32. PCOs that may be common carriers or common carrier affiliates, but that do not provide video programming within the service territory of any affiliated incumbent local exchange carrier or cable operator, are similarly situated to all other PCOs. There is nothing in the record suggesting that such a prohibition is warranted for these "non-cable operators" that provide increased competition and consumer benefits in underserved markets, but that do not have market power or significantly hinder distribution of video programming to subscribers or consumers.

Commission's authority to a few select areas. Specifically, the Communications Act mentions PCOs – otherwise known as Satellite Master Antenna Television Systems ("SMATVs") – in Section 533, which generally prohibits franchised cable operator cross-ownership of SMATVs within the cable operator's franchised service area.33 This provision grants the Commission no authority whatsoever over the operations of PCOs. The Communications Act also includes PCOs or SMATVs in its provisions governing equal employment opportunity at cable systems34 and mentions SMATVs in a statutory directive ordering the Commission to conduct an inquiry on the need for universal encryption standards for satellite programming.[35] The Commission also has interpreted the broad, non-exhaustive definition of "multichannel video programming distributor" set forth in Section 522(13) of the Communications Act[36] in order to include PCOs or SMATV systems under certain statutory provisions and Commission rules that apply to all MVPDs.[37] None of these statutes, however, nor any of the

[33] *See* 47 U.S.C. § 533(a).

[34] *See id.* § 554(h).

[35] *See id.* § 605(g)(4). The Commission concluded this inquiry nearly eighteen years ago. *See In the Matter of Inquiry into the Need for A Universal Encryption Standard for Satellite Cable Programming*, Report, 5 FCC Rcd 2710 (1990).

[36] 47 U.S.C. § 522(13) ("[T]he term 'multichannel video programming distributor' means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.").

[37] *See, e.g.*, 47 C.F.R. § 76.64(d) (listing SMATV operators among the types of MVPDs that generally must obtain retransmission consent from commercial broadcast television stations under 47 U.S.C. § 325(b)); 47 C.F.R. § 76.1000(e) (listing SMATV operators among the types of MVPDs that are protected by – but not subject to – the program access rules applicable to cable operators and programming vendors under Section 628 of the Cable Act, 47 U.S.C. § 548); 47 C.F.R. § 76.1200 (including SMATVs among the types of MVPDs subject to the competitive navigation devices rules promulgated pursuant to Section 629 of the Cable Act, 47 U.S.C. § 549); 47 C.F.R. § 1300(d) (including SMATVs among the types of MVPDs subject to the program carriage rules promulgated pursuant to Section 616 of the Cable Act, 47 U.S.C. § 536).

Commission rules promulgated pursuant to these statutes, give the Commission authority to regulate PCOs generally or PCO exclusivity clauses.

The Commission's lack of express authority to regulate PCO exclusivity clauses, as evidenced by the Commission's inability in the FNPRM to propose a single statutory provision as a basis for such regulation, stands in stark contrast to the situation under the Commission's Over-The-Air Reception Devices or "OTARD" rules that grant individual tenants a right to install on property they lease DBS dishes or antennas for the reception of video programming.[38] The Commission promulgated the OTARD rules pursuant to an explicit statutory mandate set forth in Section 207 of the Telecommunications Act of 1996.[39] By contrast, there is no express statutory authority or congressional directive authorizing the Commission to prohibit PCO exclusivity clauses or granting MDU residents a right to obtain service from other MVPDs outside of the MDU owner's control. The Commission's general jurisdiction over video programming distribution by wire or radio (discussed more fully below) thus is insufficient to overcome the lack of express statutory authority for regulating PCOs in the manner contemplated by the FNPRM.

The Commission's inability to cite even a single statutory provision as the basis for regulating PCO exclusivity clauses is a clear manifestation of the obvious: the Commission lacks such direct authority. Thus, and as explained in greater detail

[38] *See* 47 C.F.R. § 1.4000.

[39] *See Preemption of Local Zoning Regulation of Satellite Earth Stations and Implementation of Section 207 of the Telecommunications Act of 1996*, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 11 FCC Rcd 19276 (1996).

below, absent some ancillary authority (which does not exist) to impose an exclusivity prohibition on PCOs, the Commission may not regulate PCOs in this manner.

**2. The Commission Lacks Ancillary Authority to Extend the Prohibition to PCOs.**

It is well settled that, "[a]lthough somewhat amorphous, ancillary jurisdiction is nonetheless constrained."[40] As recent appellate court decisions reversing the Commission have made clear, where there is no explicit statutory foundation for the Commission's action, ancillary authority cannot serve as a backstop unless two longstanding requirements imposed by the Supreme Court in United States v. Southwestern Cable Company are satisfied: (1) the subject of the regulation is covered by the Commission's general grant of jurisdiction under Title I of the Communications Act;[41] and (2) the regulation is "reasonably ancillary to the effective performance of the Commission's various responsibilities."[42]

The Commission relied on its ancillary authority forty years ago to impose certain regulations on cable operators, before Congress had provided it with explicit authority to do so by amending the Communications Act. The D.C. Circuit more recently, however, has made it quite clear that the Commission cannot rely on its so-called general authority or its ancillary authority to imbue itself with new power that it does not have, or to bootstrap some other existing authority in order to reach new ground. For example, in Motion Picture Ass'n of America, Inc. v. FCC, the D.C.

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[40] *American Library Ass'n*, 406 F.3d at 692.

[41] *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 167 (1968).

[42] *Id.* at 178.

Circuit vacated the Commission's proposed video description rules that would have required certain local broadcast network affiliates to provide fifty hours of video description service per quarter, during either prime time or children's programming.[43] The court held that the Communications Act "[b]y its terms . . . [did] not provide the FCC with the authority to enact" such rules because, contrary to the Commission's assertions in that case, Section 1 of the Act – an introductory provision creating the Commission to, among other things, "regulat[e] interstate and foreign commerce in communication by wire and radio so as to make available . . . to all people of the United States . . . wire and radio communication service"[44] – does not grant the Commission "unlimited authority to act as it sees fit with respect to all aspects of television transmissions, without regard to the scope of the proposed regulations."[45]

Without express statutory authority to promulgate the video description rules at issue, the D.C. Circuit held in Motion Picture Ass'n of America that the Commission could not rely on ancillary authority under Section 1 – or on other provisions such as Sections 303(r)[46] and 4(i) – to implement even putatively valid policy goals and public interest determinations. Stating what apparently should have been obvious, the court held that "[t]he FCC cannot act in the 'public interest' if the agency does not otherwise have the authority to promulgate the regulations at

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[43] *Motion Picture Ass'n of America,* 309 F.3d 796, 800 (D.C. Cir. 2002).

[44] 47 U.S.C. § 151.

[45] *Id.* at 798.

[46] 47 U.S.C. § 303(r) (authorizing the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of" the Communications Act). *See also Motion Picture Ass'n of America, Inc. v. FCC*, 309 F. 3rd at 806 (discussing Commission authority under Sections 303(r), Section 4(i), and other provisions cited as statutory bases for the video description rules).

issue."[47] The court therefore concluded that, even if the Commission's proposed rules might be "highly salutary," the fact that the Commission could "point to no statutory provision that gives the agency authority to mandate visual description rules" was determinative of the matter and required the court to vacate the rules.[48]

The D.C. Circuit reached the same conclusion more recently in American Library Ass'n v. FCC when it struck down the "broadcast flag" rules intended to prevent the unauthorized copying and redistribution of digital television ("DTV") programming by requiring digital television receivers to include technology allowing them to recognize the broadcast flag – "a digital code embedded in a DTV broadcasting stream, which prevents digital television reception equipment from redistributing broadcast content" after the content already has been received by the consumer.[49] In American Library Ass'n, "the Commission relied exclusively on its ancillary jurisdiction under Title I of the Communications Act" only to have the court find that because "[t]here is no statutory foundation for the broadcast flag rules . . . the rules are ancillary to nothing" and thus had to be struck down.[50]

With this as background, it should be quite clear that, in addition to lacking explicit statutory authority for its proposed rule, the Commission cannot possibly possess ancillary authority to extend the prohibition on exclusive service contracts to PCOs because the Commission cannot meet both prongs of the Southwestern Cable test. The Commission cannot satisfy the first prong – that the subject of the

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[47] *Id.*, 309 F.3d at 806.

[48] *Id.* at 807.

[49] *American Library Ass'n v. FCC*, 406 F.3d at 691.

[50] *Id.* at 691-92.

regulation be covered by the Commission's general grant of jurisdiction under Title I of the Communications Act – because nothing in Title I imbues the Commission with sufficient authority to heap regulation on a class of service providers that, with the exception of a few statutory requirements, Congress has refrained from regulating.

Even if the Commission were to find the video services of PCOs subsumed by Section 1 of the Act, and thus within the ambit of Title I by virtue of Section 1's reference to "wire communication," the Commission nevertheless would fail to satisfy the first prong of the Southwestern Cable test because, as the D.C. Circuit recently made clear in American Library Ass'n, the Act does not give the Commission unconstrained discretion to regulate all facets of video operations under Title I with "no meaningful limits on the scope of the FCC's general jurisdictional grant."[51] No provision in Title I – or Title VI or any other title of the Act, for that matter – addresses exclusivity clauses for MVPD access to MDUs or other real estate developments, much less PCO use of such exclusivity clauses. And while the Commission's general authority under these titles of the Communications Act may be broad, it is not unlimited.[52] Nowhere in the Act, for example, has Congress given the Commission plenary authority to regulate all MVPDs or PCOs specifically. The Commission cannot issue regulations pursuant to ancillary jurisdiction where, as here, Congress has not delegated authority to the Commission to regulate the subject matter at hand.[53]

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[51] *American Library Ass'n v. FCC*, 406 F.3d at 703.

[52] *See Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d at 804.

[53] *See id.* at 801.

The Commission's purported exercise of ancillary authority to extend an exclusivity clause ban to PCOs would even more clearly founder on the second condition imposed by the Supreme Court in Southwestern Cable: such action would not be reasonably ancillary[54] to the effective performance of the Commission's responsibility to promote competition among video service providers – the purported rationale for prohibiting exclusive arrangements by cable operators under Section 628(b). Whatever the appeal of "regulatory parity" for different types of video service providers,[55] the record in this proceeding demonstrates that PCO exclusivity clauses promote multichannel video competition, provide consumer benefits, and facilitate broadband deployment. Moreover, PCOs provide these benefits in an array of different types of communities, including, for example, in rural and under-served areas unlikely to receive advanced services from wireline incumbent providers at any time in the foreseeable future, if ever.[56] As explained in Part B below, there is ample justification for the Commission to recognize the disparities that exist between PCOs and the much larger video service providers against which PCOs compete, just as there is ample Commission precedent to support differing treatment for different types of service providers to foster competition from new entrants and small providers.

[54] *See Southwestern Cable Co.*, 392 U.S. at 178.

[55] Order ¶ 2.

[56] *See, e.g.*, Comments of Shenandoah Telecommunications Company, MB Docket No. 07-51, at 8, 12-14 (filed July 2, 2007); Reply Comments of Advance/Newhouse Communications, MB Docket No. 07-51, at 2 (frilled August 1, 2007); *see also* Part IV, *supra*, discussing these and other policy rationales for allowing continued PCO enforcement of existing exclusivity clauses and entry into new ones.

Even without recognizing the benefits that PCO exclusivity clauses engender, however, there is nothing in the record indicating that PCOs' use of these types of agreements constitute an unfair method of competition or deceptive act or practice that significantly hinders the distribution of video programming to consumers. In other words, even if Section 628(b) provides authority to prohibit cable operators' use of such practices, and even if the Commission somehow might have some authority over PCOs pursuant to Title I and certain provisions of Title II and Title VI, there is no factual basis for concluding that prohibiting exclusivity clauses for PCOs is necessary or reasonably ancillary to the Commission's stated purpose of materially "enhancing competition and broadband deployment."[57] As explained more fully in Part B below, PCOs do not exercise market power in any market or even serve a significant fraction of the nation's MVPD subscribers.[58] The Commission's various rationales for prohibiting cable operators from entering into or enforcing exclusive service contracts therefore do not apply to PCOs.[59] Indeed, the evidence in the record demonstrates overwhelmingly that PCOs bring tremendous benefits to consumers. Taking steps to extend the prohibition to PCOs therefore actually would decrease

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[57] Order ¶ 1.

[58] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, ¶ 130 (2006) ("*Twelfth Annual Video Report*") (reporting that "PCOs continue to serve a small number of MVPD subscribers" and that "PCO subscribership has declined to one million subscribers"). The present Order reports that approximately thirty percent of Americans live in MDUs, and that number is on the increase. *See* Order ¶ 1. Of course, even using these Commission figures that place PCO subscribership at one million, the percentage of Americans receiving video service from PCOs – both in MDUs and in other real estate developments – is far lower than thirty percent, measuring one percent or less. *See Order* ¶ 8 n.16 (citing 2005 census data indicating that there were 111 million households in the United States)..

[59] Order ¶ 32.

competition and diversity in the multichannel video market.[60] As a result, a Commission action to ban exclusivity clauses for such entities would not be reasonably ancillary to the effective performance of any Commission duty.

The Supreme Court's decision on the Commission's ancillary jurisdiction in FCC v. Midwest Video Corp. ("Midwest II") is particularly instructive here. In Midwest II, the Supreme Court confirmed that ancillary jurisdiction indeed can strain and exceed the outer limits of Commission authority.[61] The Court in Midwest II struck down rules that the Commission had imposed – in the absence at that time of any express statutory authority – that would have required cable operators with a minimum number of subscribers to expand channel capacity and to make certain channels available for public, educational, and governmental access.[62] In striking down these rules, the Supreme Court held that, if enacted, the rules would impermissibly have imposed common carrier obligations on cable operators.[63] The Court in Midwest II found the Commission's action unlawful particularly because the Act's definition of "common carrier" expressly excludes broadcasters, and thus, by extension, cable operators in the ancillary jurisdiction context.

Just as the Commission could not turn a cable system into a common carrier in Midwest II, the Commission cannot in this proceeding rely on its purported authority under Section 628(b) and its ancillary jurisdiction to turn a PCO into a cable operator. The Act's definition of "cable operator" effectively excludes PCOs because it defines a

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60 *See* Order ¶ 1 n.5.

61 *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708 (1979).

62 *See id.* at 691-92.

63 *Id.* at 700-09.

"cable operator" as an entity that provides cable service over or operates a "cable system," and, in turn, defines the term "cable system" to expressly exclude "a facility that serves subscribers without using any public right-of-way" – which is precisely the sort of facility on which PCOs rely to deliver video service.[64] Had Congress not defined "cable operator" in a manner that so clearly excludes PCOs, it is conceivable, though still unlikely given the record in this proceeding, that the Commission could muster sufficient ancillary authority to impose on PCOs the exclusive service contract prohibition steeped in section 628(b) (a statute that applies only to cable operators). But because Congress so clearly excluded PCOs from the definition of "cable operator," the Commission cannot possibly impose section 628(b)'s prohibition on them. In other words, the Commission cannot through its ancillary authority impose a cable regulation on PCOs when the Act itself so clearly distinguishes PCOs from cable operators.

Additionally, the absence of a statute prohibiting such treatment of PCOs certainly cannot provide the Commission with the authority to regulate PCOs in this manner. Indeed, when the Commission argued in Motion Picture Ass'n of America that the adoption of rules mandating video description was permissible because Congress did not expressly foreclose the possibility, and when the Commission advanced a similar argument in American Library Ass'n, the D.C. Circuit dismissed

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[64] *See* 47 U.S.C. § 522(5) (defining "cable operator" as "any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who others controls or is responsible for, through any arrangement, the management and operation of such a cable system"); *id.* § 522(7) (defining "cable system" in relevant part as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service . . . but such term does not include . . . (B) a facility that serves subscribers without using any public right-of-way").

the argument both times as "entirely untenable."[65] Congress's silence on the matter does not – and, indeed, cannot – give the Commission carte blanche here.

In short, banning exclusivity clauses for PCOs would not create consumer benefits, and in fact would run counter to Congress's and the Commission's policy goals. For that reason, among others, an extension of the ban to PCOs cannot be reasonably ancillary to achievement of such goals.

### B. The Commission Can – and Should – Refrain From Regulating PCOs in Order to Promote Competitive and Consumer Benefits

As demonstrated in Part III of these comments, PCOs compete with incumbent MSOs and giant ILECs just now entering the video services market, with PCOs providing individually tailored service packages to MDUs and providing advanced services in communities that the entrenched wireline providers often do not serve. The PCO business model depends on exclusivity clauses to be viable, and without such provisions these dynamic but small competitors will find it far more difficult – or even impossible – to justify the substantial investments they currently make in infrastructure capable of supporting facilities-based broadband and advanced video services. PCOs have been pioneers in terms of providing advanced services, including the provision of such services to properties in smaller and rural markets, and their withdrawal from the marketplace more generally would eliminate a competitor to potential wireline duopoly providers. Thus, the Commission has both the authority and the incentive to prevent PCO exit from the marketplace, and can do so by regulating PCOs differently than other MVPDs subject to an exclusivity clause ban.

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[65] *American Library Ass'n,* 406 F.3d at 705; *Motion Picture Ass'n of America,* F.3d at 805.

Only by doing so will the Commission preserve the competitive and consumer benefits that PCOs generate by their presence in the marketplace.

### 1. The Commission Has Ample Basis to Regulate PCOs Differently

In the Order, the Commission rejected proposals to provide exemptions for certain categories of video service providers subject to Section 628 (such as small cable operators, cable operators in rural areas, and those that are found to lack "market power"),[66] and similarly rejected proposals for exemptions applicable to some types of MDU or real estate developments (such as planned communities or new developments).[67] Notably, however, the Commission did exclude from the prohibition time share units, academic campuses and dormitories, and other properties "characterized by institutional living, high transience and, in some cases, a high need for security."[68]

The differences between PCOs and video service providers subject to Section 628 are as easily drawn as the differences the Commission recognized between various types of MDUs. According to the Commission's most recent report on the status of competition in the market for video delivery of video programming, PCOs' share of the overall MVPD market had declined to one million subscribers by the

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66 *See* Order ¶ 38.

67 *See id.*

68 *See id.* ¶ 7 (excluding from the definition of an MDU for purposes of the exclusivity clause ban any "time share units, academic campuses and dormitories, military bases, hotels, rooming houses, jails, prisons, halfway houses, hospitals, nursing and other assisted living places, and other group quarters characterized by institutional living, high transience and, in some cases, a high need for security"). The Commission explained that such institutions do not have most of the "key defining attributes" of more typical residential MDUs, "including voluntary long-term residency and significant control by the resident over uses of the private dwelling space." *Id.*

beginning of 2006.[69] This figure likely overstates the actual number of subscribers to various PCOs nationwide, considering the amount of time that has passed since the release of that report. IMCC member statistics suggest that the number of PCO subscribers nationally is less than the Commission's latest estimate. PCOs clearly serve only a tiny subset of multichannel video programming service subscribers nationwide, particularly as compared with the substantially larger MSO and ILEC competitors, all of whom have market values well above the billion dollar range and some of whom are valued far in excess of that amount.

Given these figures, it should come as no surprise that PCOs do not possess market power, and in nearly all circumstances must struggle each day to compete against incumbent goliaths. For this reason, PCOs are similarly situated to non-dominant providers of telecommunications services, which "by definition, cannot exercise market power," and for which "the imposition of regulatory requirements . . . is unnecessary."[70] As in the case of non-dominant carriers, PCOs "do not possess market power" and their rates and terms of service are in many respects

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[69] *See Twelfth Annual Video Report* ¶ 130. Moreover, the Commission's Initial Regulatory Flexibility Analysis ("IRFA") issued in conjunction with the FNPRM made no mention of and provided no information about PCOs or the potential impact of the FNPRM on this category of small businesses. The failure of the regulatory analysis to provide any information whatsoever on PCOs is emblematic of the fact that the record in this proceeding – and the Commission's conclusions based on that record – do not justify extension of any exclusivity clause ban to PCOs. The record overwhelmingly demonstrates that PCOs are small players in the MVPD market, but that they provide vibrant and vital competition to wireline incumbents. PCOs do not have market power in any market for video services, but they do introduce and increase competition in markets that might otherwise enjoy no competition or no advanced services availability at all.

[70] *Hyperion Telecommunications, Inc. Petition Requesting Forbearance*, Memorandum Opinion and Order and notice of Proposed Rulemaking, 12 FCC Rcd 8596, ¶ 23 (1997) ("*Hyperion*") (internal quotation marks omitted).

"constrain[ed]" by the large, dominant providers against whom they compete.[71] The Commission historically has been reluctant to impose the same type of regulations on such providers, within both the telecommunications sphere and the MVPD marketplace, because the circumstances for "providers lacking market power" differ from those encountered with large, dominant providers.[72]

For instance, when the Commission agreed to forbear from imposing tariff filing requirements on competitive access providers ("CAPs"), it did so because these providers were, by definition, non-dominant and thus could not exercise market power.[73] This lack of market power, according to the Commission, made it highly unlikely that CAPs could successfully charge unreasonable, above-market rates and therefore justified subjecting CAPs to fewer regulatory requirements than their dominant counterparts. This de-tariffing example is particularly notable here because although the Commission acknowledged that inter-exchange carriers terminating calls to CAPs had no choice but to rely on them in some cases (because they were selected by the end user) and thus pay their rates for terminating access, the Commission failed to find this a sufficient basis for requiring CAPs to file tariffs because other, more powerful "marketplace forces [would] preclude [CAPs] from charging unreasonable rates for interstate exchange access."[74] In other words,

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[71] *Id.* ¶ 24.

[72] *See, e.g.*, *Implementation of Section 304 of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 14775, ¶ 90 (1998) (describing rationale for limiting application of anti-subsidy regulations to rate-regulated cable operators not subject to effective competition, while exempting those that were subject to effective competition as well as DBS providers that lacked market power).

[73] *See Hyperion*, 12 FCC Rcd at 8608 (¶¶ 23-24).

[74] *Id.* at ¶ 24.

because CAPs were small and possessed no market power, the Commission found no need to regulate them because they were highly unlikely, if not entirely unable, to charge above-market rates – even when inter-exchange carriers had no choice but to rely on their services.

The Commission reached precisely the same conclusion when, using its forbearance authority, it excused all non-dominant inter-exchange carriers from the Communications Act's tariff filing requirements.[75] In doing so, the Commission again noted that regulating non-dominant carrier differently was appropriate because it was "highly unlikely that [carriers] that lack market power could successfully charge rates, or impose terms and conditions for interstate, domestic, inter-exchange services that violate Sections 201 and 202 of the Communications Act."[76] The Commission's rules governing transfers of control and assignments of telecommunications carriers also reflect these distinctions. Dominant carriers, for example, cannot qualify for streamlined processing of their applications that way that non-dominant carriers can because they control a greater share of the market and thus must be subject to greater Commission scrutiny.[77] Carriers that are dominant with respect to particular international routes also are subject to increased regulatory obligations. They must, for example, provide services on that route through a separate entity, maintain certain separate facilities and accounts, file quarterly and other reports, and in some

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[75] *In re Policy and Rules Concerning the Interstate, Interexchange Marketplace,* 11 FCC Rcd 20730, 20750 (¶ 36) (1996).

[76] *Id.*

[77] *See* 47 C.F.R. § 63.03(b).

cases be subject to rate regulation.[78] In each instance, these increased regulatory obligations are a direct result of – and are intended to protect against – the market power the dominant carrier is capable of exercising absent Commission oversight.

Each PCO serves a very small – and, in most cases, miniscule – portion of any community or geographic market in which it operates, meaning that PCOs simply do not have the power to lock any MDU into an unfavorable exclusivity clause. In order to compete against franchised providers, PCOs typically must offer more to MDU residents in the way of superior service quality, better choices, or lower rates than are available from the wireline incumbents. PCOs can and do compete vigorously against franchised providers, and the increased consumer benefits generated from such competition creates net consumer benefits wherever such PCO-driven competition takes place.

The Commission may be reluctant to undertake the burden associated with case-by-case determinations regarding market power of individual MVPDs or classes of video service providers. That is understandable. Fortunately, it can conclude readily on the basis of the record generated in this proceeding – as well as information developed by the Commission when compiling its video competition reports – that no PCO exercises market power or engages in harmful conduct of the kind that might be prohibited by Section 628. The Commission can, therefore, on this basis alone, justify treating PCOs differently from others, as it routinely does so for all types of small competitive providers.

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[78] *Id.* at § 63.10(c).

### 2. The Commission Routinely Regulates Smaller Providers or New Entrants Differently Than Other Providers of the Same Services

The Commission's rules are replete with examples of regulations that treat differently situated providers in a different fashion even when the providers are subject to a single statutory command – which, of course, is decidedly not the case here, where the Commission fully acknowledges that Section 628 does not apply as a rule to PCOs. Still clearer is the Commission's discretion to provide different regulations for different types of providers regulated under different statutory provisions, or under statutes that explicitly direct the Commission to make such regulatory distinctions. As amply illustrated by the examples below, however, the Commission institutes such rule-based distinctions, however, even when there is no distinction set out in the statute, and it does so based on distinctions stemming from differences in factors such as the regulated entities' relative geographic scale, financial wherewithal, number of subscribers, technology employed, or status as either incumbents or new entrants in a particular product market.

In the PCO context, for example, Section 325(b) of the Communications Act[79] requires all MVPDs to obtain retransmission consent from commercial television broadcast stations. The Commission nonetheless exempts PCOs from this requirement by rule when a PCO or other Master Antenna Television ("MATV") provider that acts as an MVPD provides broadcast signals to subscribers at no cost and satisfies certain other conditions.[80] The Commission provides this exemption

[79] 47 U.S.C. § 325(b).

from the retransmission consent requirement even though the rules clearly define a PCO as a type of MVPD otherwise subject to the requirements of Section 325(b) of the Communications Act.[81]

In its recent Section 621 implementation order extending certain franchising relief to cable operators that the Commission previously had granted to incumbent local exchange carriers now entering the MVPD market, the Commission determined that many of its findings regarding new entrants should be applicable to cable operators as well.[82] The Commission also concluded, however, that relief from certain obligations and other streamlining procedures made available to local exchange carrier video entrants should not be available to incumbent cable operators.[83] The Commission thus chose to keep in place certain statutory thirty-six month timeframes for cable franchise renewal negotiations set forth in Section 626 of the Cable Act,[84] though it had established earlier in the proceeding a much shorter ninety-day

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[80] *See* 47 C.F.R. § 76.64(e) (stipulating the a PCO need not obtain retransmission consent if it "makes reception of such signals available without charge and at the subscriber's option"; and when "the antenna facility used for the reception of such signals is either owned by the subscriber or the building owner," or is otherwise under the present control of the property owner and available for purchase upon termination of the service).

[81] *See id.* § 76.64(d). The Commission justified this distinction between PCOs and other types of entities on the basis of factual differences between different types of providers. Analyzing retransmission at no charge of broadcast signals received via a master antenna installed by the MVPD or the building owner, and comparing this practice to an individual consumer's reception of broadcast signals via the consumer's own antenna, the Commission created this exemption despite the lack of any such exemption for different types of MVPDs in Section 325(b) itself. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 2965, ¶ 135 (1993).

[82] *See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order, MB Docket No. 05-311, FCC 07-190, ¶ 7 (rel. Nov. 6, 2007) ("*Section 621 Second Report and Order*") (determining to extend to incumbent cable operators relief from various franchise fee provisions; public, educational, and government ("PEG") access programming obligations; and institutional network ("I-Net") obligations, as well as non-cable related services and facilities requirements).

[83] *See id.*

[84] *See id.* ¶ 8; *see also* 47 U.S.C. § 546.

timeframe for consideration of certain new entrants' initial franchise applications.[85] In the end, the Commission went so far as to state its belief "that the facts and circumstances of each [cable operator's] situation must be assessed on a case-by-case basis under applicable law to determine whether our statutory interpretation should alter the incumbent's existing franchise agreement."[86] In other words, incumbents and new entrants could, in theory, avail themselves of different Commission interpretations for the same provisions of the Cable Act depending on each MVPD's individual circumstances.

Even in the context of important public safety obligations such as Emergency Alert System ("EAS") requirements, the Commission prescribes rules to implement the statutory directive in Section 624(g) of the Cable Act that "each cable operator shall comply with such standards as the Commission shall prescribe to ensure that viewers of video programming on cable systems are afforded the same emergency information" that had been afforded by the emergency broadcasting system previously applicable to over-the-air broadcasts alone.[87] The statute obviously gives the Commission discretion to craft EAS rules; yet despite the seemingly uniform requirement that "each cable operator" provide viewers with a minimum level of emergency information, Section 11.11 of the Commission's rules creates distinctions between the EAS capabilities that cable systems in general and cable systems serving

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[85] *See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, ¶ 71 (2007) (setting ninety days as a time limit for initial franchise negotiations for a new applicants that already have access to rights-of-way).

[86] *Section 621 Second Report and Order* ¶ 19.

[87] 47 U.S.C. § 544(g).

fewer than 5,000 subscribers from a headend must possess.[88] Moreover, the rule also phased in over time various minimum capability requirements for small cable operators.[89]

The Commission likewise has adopted by rule different reporting and technical compliance filing requirements for traditional cable operators of different sizes, requiring the operators of every system that serves 20,000 or more subscribers to submit to the Commission annually general information and signal distribution reports, but merely retaining authority to require similar filings by a "sampling" of cable operators serving fewer than 20,000 subscribers.[90] The Commission lessened the administrative burdens on the cable industry as a whole and on smaller operators in particular, by eliminating the requirement for time-consuming annual submission of these forms by the vast majority of cable systems.[91] Furthermore, outside of the video services context, the Commission routinely crafts different regulations for non-dominant service providers such as competitive local exchange carriers, inter-exchange carriers, and other such competitive entrants. As previously noted, non-dominant telecommunications service providers that fit these and other categories need not file tariffs with the Commission,[92] enjoy streamlined processing of Section

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[88] *See* 47 C.F.R. § 11.11.

[89] *See id.*

[90] *See id.* § 76.403.

[91] *See Section 257 Report to Congress (Identifying and Eliminating Market Entry Barriers For Entrepreneurs and Other Small Businesses)*, Report, 15 FCC Rcd 15376, ¶ 98 (2000) (describing this "relief afforded [to] small cable systems" as another example of "small entity-friendly rules for the cable industry").

[92] *See* 47 C.F.R. § 61.19(a).

214 transfer applications,[93] and operate under different interconnection requirements[94] than dominant or incumbent providers.

In each of these instances, covering a very broad range of statutory and regulatory requirements and circumstances, the Commission chose to regulate certain classes of providers differently on the basis of these entities' respective technology platforms, status as incumbents or as competitive entrants in the marketplace, or number of subscribers served. The reason for such varied treatment was recognition by the Commission that establishing "regulatory parity" for different providers that compete in the same marketplace is not always an exercise in reflexively imposing identical rules on entities that have vastly different resources at their disposal, status within the market, or technical solutions in place to serve their customers.[95]

IMCC respectfully submits that the Commission should exercise similar discretion here to regulate PCOs differently from the much larger wireline incumbents and well-financed local exchange carriers entering the video market that are subject to Section 628(b). By doing so, the Commission would follow its sound, past precedent and policy of recognizing distinctions between competitors that are superficially similar but that actually operate under very different terms and marketplace conditions. The Commission routinely treats different competitive

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[93] *See id.* § 63.03 (listing categories of providers that presumptively receive streamlined treatment).

[94] *See* 47 U.S.C. § 251(c) (setting forth additional interconnection requirements of incumbent local exchange carriers, which must not only interconnect with other telecommunications providers under subsection (a) of the statute, but also must negotiate in good faith with any competitive carrier and fulfill other duties).

[95] *See, e.g.*, *Section 621 Second Report and Order* ¶ 19 (suggesting reliance on individual facts and circumstances, on a case-by-case basis, to determine the advisability of modifying an incumbent cable operator's existing franchise agreement after a new provider has entered the market or obtained a competitive franchise).

entities differently when merited, as is the case here. The Commission should recognize in this proceeding the real differences, demonstrated in the record already gathered in response to the initial Notice of Proposed Rulemaking, between PCOs and much larger MVPDs. The Commission should not rely on authority that is tenuous – at best – to prohibit PCO exclusivity clauses, in an attempt to impose artificial regulatory parity where there is little parity between the entities' positions in the market. Instead, the Commission should use the authority it certainly does have to regulate PCOs differently, thereby preserving PCO exclusivity clauses and the competitive and consumer benefits that such entities create.

## VII. Conclusion

IMCC and the PCO industry assert that exclusive agreements produce benefits for MDU consumers. If exclusive service/access contracts are prohibited PCOs will be less able to compete with the larger providers and their ability to stay in the marketplace will be diminished. That is the economic reality. If the Commission is to accomplish its objective of enhanced video competition, it needs to recognize that due to the size of PCOs they have virtually no market power. Also, due to past Commission decisions MSOs and Common Carriers have been accorded numerous regulatory advantages. In certain situations one class of providers has been treated differently than another class. The Commission has also recognized that in certain situations exact parity of regulatory treatment is not attainable but regulatory equity, the balance of influences, is attainable. We urge the Commission to maintain the current treatment of exclusive contracts for PCOs.